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IN THE

Supreme Court of the United States

JOEL SEREBOFF AND MARLENE SEREBOFF,

Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE SELF-INSURANCE INSTITUTE OF AMERICA, INC. - IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Self-Insurance Institute of America, Inc. ("SIIA") is a non-profit organization with nearly 1000 members, serving tens of millions of health plan beneficiaries, dedicated to the advancement and protection of the self-insurance industry. SIIA's membership includes self-insured entities such as employer plan sponsors, as well as service providers such as third-party administrators, reinsurance companies, and other entities that support the self-insurance business. SIIA is the only organization in the United States that exclusively represents firms, professionals, and organizations that participate in the broad spectrum of self-insurance, including self-insured group health plans.

Through SIIA, its members coordinate their views and provide practical information and recommendations to government and the public on a range of subjects relevant to the effective functioning of the self-insurance system, including the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, that concern self-insured health plans and plan participants. SIIA's mission includes rendering assistance to courts in their deliberations on significant self-insured health plan issues of broad concern to its members. Indeed, SIIA has filed briefs as *amicus curiae* in previous ERISA cases before the Court. *See, e.g.*, Brief *Amicus Curiae* of Self-Insurance Institute of America, *Great-West Life & Annuity Insurance Co. v. Knudson*, No. 99-1786 (filed May 10, 2001).

SIIA has a strong interest in preserving its members' ability to recover plan funds from participants that accept medical benefits but then refuse to honor the reimbursement

1. The parties have filed letters with the Court consenting to all *amicus* briefs. No counsel for a party has written this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

terms of their agreements after obtaining compensation from third parties through legal action or settlement. SIIA's members depend on reimbursement to ensure the solvency of their plans and to provide benefits to all participants at lower costs. To the extent that SIIA's members are barred from seeking reimbursement according to the terms of a plan, they might be forced to take dramatic action, such as increasing contributions, reducing benefits, or otherwise amending plan terms to protect against this growing and unnecessary risk. Each of these scenarios will result in a reduction in health care insurance for the Nation's workforce based solely on judicially approved inequitable practices.

SUMMARY OF ARGUMENT

Congress enacted ERISA to meet the twin goals of uniform administration of employee benefit plans and plan solvency. For this reason, Congress made ERISA broadly preemptive and provided a series of mechanisms for recovery of plan funds, including "appropriate equitable relief" pursuant to Section 502(a)(3) of ERISA. 29 U.S.C. § 1132(a)(3). This Court consistently has maintained that "appropriate equitable relief" refers to "those categories of relief that were typically available in equity" including, for example, restitution. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993). In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), the Court clarified the circumstances under which restitution is available. Under *Knudson*, Section 502(a)(3) allows restitution where the relief sought comports with traditional equitable principles. Thus, recovery through the imposition of a constructive trust or equitable lien is permissible so long as the funds sought are traceable to an identifiable fund.

This is precisely the case here. Respondent MAMSI honored the terms of the plan and paid the Sereboffs' medical expenses of approximately $75,000. The plan contained a standard subrogation provision that required the Sereboffs

to reimburse the company if the Sereboffs recovered from a third-party tortfeasor. Although the Sereboffs eventually settled their personal injury suit against the third-party tortfeasor for $750,000, they steadfastly refused to reimburse MAMSI. MAMSI thus sought judicial relief, invoking its subrogation-based right to reimbursement.

Subrogation-based restitution is without question a remedy that was "typically available" in equity. And there is no dispute that the funds at issue are traceable to an identifiable fund belonging to the Sereboffs. Accordingly, although two courts of appeals have erroneously concluded that *Knudson* forecloses equitable restitution altogether, this case presents a routine application of that decision. Unfortunately, the straightforward command of *Knudson* has not dissuaded plan participants and their counsel from distorting *Knudson*'s discussion and analysis of Section 502(a)(3) to thwart recovery, even in the many circuits that have properly recognized that, post-*Knudson*, equitable restitution remains a viable remedy. In the discussion that follows, *amicus* SIIA highlights three common examples of these subterfuges.

First, the plaintiffs' bar has argued that recovery is not permitted if the plan participant has converted the funds for his or her own use. Thus, plan participants are encouraged to convert damages awards and settlement payments into property to frustrate reimbursement claims. *Knudson* did not endorse such abusive and manipulative practices, but merely observed that recovery is foreclosed when the funds have been dissipated so that "no product remains." 534 U.S. at 212. Where a product remains, the Court explained that it was retaining the rule of *Harris Trust & Savings Bank v. Salomon Smith Barney Inc.*, that the "trustee or beneficiaries may . . . maintain an action for restitution of the property (if not already disposed of), and disgorgement of proceeds

(if already disposed of), and disgorgement of the third person's profits derived therefrom." 530 U.S. 238, 250 (2000).

Second, the plaintiffs' bar has frequently distorted *Knudson* by arguing that funds are not traceable to an identifiable fund when the money is commingled with the plan participant's general assets. This argument is unsustainable under traditional principles of equity. As the Restatement of Restitution explains, "[t]he person whose money is wrongfully mingled with money of the wrongdoer does not thereby lose his interest in the money, although the identity of his money can no longer be shown, but he acquires an interest in the mingled fund." RESTATEMENT (FIRST) OF RESTITUTION § 209 (1937). Purporting to follow *Knudson*, some courts have mistakenly concluded that commingling is fatal to a claim asserted under Section 502(a)(3). *Knudson* cannot be read, however, to create a commingling loophole that would effectively undo any means of recovery under Section 502(a)(3).

Third, the plaintiffs' bar has argued in the lower courts that funds are not subject to reimbursement if they are transferred to an account in the attorney's possession before the constructive trust or equitable lien can be imposed. This argument is inconsistent with basic principles of equity, directly contradicted by *Knudson*, and contrary to basic agency law. The attorney is the agent of the plan participant and holds the funds subject to the direction of the principal. The funds – rightfully subject to reimbursement – thus remain in the "constructive" possession of the plan participant. ERISA cannot be construed to condone cat and mouse games that plainly are at odds with the overarching purposes of Congress's statutory scheme.

Furthermore, the legal questions at issue in this case cannot be divorced from the broad purposes of ERISA or the practical impact that rules of recovery adopted in this and

similar cases have on self-funded plans. Outright precluding reimbursement – as the Sixth and Ninth Circuits have done – or incentivizing the plaintiffs' bar to evade recovery through cynical and manipulative tactics, will inevitably lead employers to take remedial action that will inure to the detriment of their employees. In particular, employers could be forced to increase employee contributions, reduce benefits, or both. Employers also might take steps to obtain recovery by withholding future benefits or limit the availability of insurance for third-party negligence claims. This is particularly true in the case of self-funded plans that, in exchange for the flexibility that self-funding provides, assume the risk of loss.

The judicial preclusion of equitable restitution and other equitable remedies that plainly are contemplated by Section 502(a)(3) cannot be squared with the core purposes of ERISA. Accordingly, in affirming the decision below, the Court should clarify that *Knudson* neither eliminates the right of employer plans to seek equitable restitution nor condones cynical gamesmanship calculated to defeat plan claims for reimbursement.

ARGUMENT

I. THE FOURTH CIRCUIT CORRECTLY RULED THAT SECTION 502(a)(3) OF ERISA ALLOWS EQUITABLE RESTITUTION OF FUNDS SUBJECT TO REIMBURSEMENT.

Section 502(a)(3) of ERISA allows a "participant, beneficiary or fiduciary" to obtain "appropriate equitable relief" to "enforce any provisions of . . . the terms of the plan." 29 U.S.C. § 1132(a)(3). This Court has explained that "appropriate equitable relief" includes "those categories of relief that were typically available in equity" including, for example, "injunction, mandamus, and restitution[.]" *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993);

see also Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 253 (2000) ("[A]n action for restitution against a transferee of tainted plan assets satisfies the 'appropriate[ness]' criterion in § 502(a)(3). Such relief is also 'equitable' in nature.") (citation omitted). As the Third Circuit has summarized:

> Put simply, equitable relief under § 502(a)(3)(B) is to be construed by reference to the types of relief typically available in equity, and courts are to analyze the underlying nature of the claim and relief requested by a plaintiff in order to determine whether that relief has been typically available in equity.

Skretvedt v. E.I. DuPont De Nemours, 372 F.3d 193, 211 (3d Cir. 2004) (internal quotations omitted).

In *Great-West Life & Annuity Inc. Co. v. Knudson*, 534 U.S. 204, 214 (2002), the Court drew an admittedly "fine distinction between restitution at law and restitution in equity" and in so doing clarified that not all restitution claims were cognizable in equity. Because "[i]n the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity . . . restitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case[.]" *Id.* at 212-13 (citations and internal quotations omitted). The Court added: "whether [the claim] is legal or equitable depends on the basis for [the plaintiff's] claim and the nature of the underlying remedies sought." *Id.* (citations omitted).

According to *Knudson*, the distinction between legal and equitable restitution ordinarily turns on whether the plaintiff is able to identify specific funds or property in the defendant's possession. Historically, where "the plaintiff could *not* assert title or right to possession of particular property . . . the plaintiff had a right to restitution *at law* through an action derived from the common-law writ of assumpsit." *Id.* at 213

(citations and internal quotations omitted). Conversely, "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id.* (emphasis in original) (citations omitted). Hence, the Court found that, within the limitations that traditional equity jurisprudence places on restitutionary awards, Section 502(a)(3) plainly authorizes recovery of wrongfully retained benefits from plan participants. *See Knudson*, 534 U.S. at 213 ("[A] plaintiff could seek restitution in equity . . . where *money* or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession.") (emphasis added); *see also Skretvedt*, 372 F.3d at 211 ("[A] plaintiff [can] seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff [can] clearly be traced to particular funds or property in the defendant's possession."). This brand of equitable relief typically is accomplished through the imposition of a constructive trust or an equitable lien. *See Knudson*, 534 U.S. at 213 ("A court of equity could . . . order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner.").

This case falls squarely within the class of equitable restitution claims endorsed in *Knudson*. MAMSI honored the terms of the plan and paid the Sereboffs' medical expenses, which totaled $74,869.37. *See Mid Atl. Med. Servs., Inc. v. Sereboff*, 303 F. Supp. 2d 691 (D. Md. 2004), Joint Stipulation of Facts (Attachment to Court Opinion) ¶ 10, *aff'd*, 407 F.3d 212, 218 (4th Cir. 2005), *cert. granted*, 126 S. Ct. 735 (2005). The plan required the Sereboffs to "reimburse the Company net of reasonable attorney fees and

court costs prorated to reflect that portion of the total recovery which is due the Company for benefits paid." *Id.* ¶ 11. MAMSI repeatedly made both the Sereboffs and their personal injury counsel aware of the duty owed under the plan's reimbursement provision. *See id.* ¶¶ 13-21; 23-26; 30-33. The Sereboffs eventually settled their personal injury suit against the third-party tortfeasor for $750,000, *see id.* ¶ 34, but refused to reimburse MAMSI. *See id.* ¶ 37. MAMSI thereafter sought judicial enforcement of its equitable right to subrogation-based reimbursement. *See* Brief of Petitioners at 21 ("Pet. Br.") ("The district court's assertion that the funds in question belong in good conscience to the Plan' (because the plain language of the plan indisputably requires reimbursement under the circumstances of the Sereboffs' tort claims arising out of the California accident) is perhaps true as a matter of fairness.") (internal quotation omitted).

Subrogation is a typical equitable remedy. As one court explained, "[s]ubrogation is an equitable doctrine the essential purpose of which is to provide for a proper allocation of payment responsibility. It seeks to impose ultimate responsibility for a wrong or loss on the party who, in equity and good conscience, ought to bear it." *Mahler v. Szucs*, 957 P.2d 632, 640 (Wash. 1998) (citing Ronald C. Horn, SUBROGATION INSURANCE THEORY AND PRACTICE 3 (1964)); *see also Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 137 n.12 (1962) (explaining that subrogation is "a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties") (quoting *Memphis & L.R.R. Co. v. Dow*, 120 U.S. 287, 301-302 (1887)); 1 George E. Palmer, THE LAW OF RESTITUTION 1.5(b) (1978) ("Subrogation is an equitable remedy that was used as early as the seventeenth century."); D. Dobbs, LAW OF REMEDIES 4.3(1) (2d ed. 1993) (explaining that subrogation is a "major restitutionary remedy in equity"). A crucial aspect of equitable subrogation "is the right to reimbursement."

Mahler, 957 P.2d at 640; *see also* RESTATEMENT (FIRST) OF RESTITUTION § 162 ("Where property of one person is used in discharging an obligation owed by another . . . under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee."); Alan O. Sykes, *Subrogation and Insolvency*, 30 J. Legal Stud. 383, 383 (June 2001) ("If the insured has already received money from the injurer, the insured may hold such funds in a 'constructive trust' for the insurer because of the insurer's subrogation rights.").

The vast majority of courts that have considered claims similar to the one presented here have concluded that a constructive trust or equitable lien for the recovery of plan funds "nestles comfortably with ERISA's concept of equity." *Admin. Comm. of Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan v. Varco*, 338 F.3d 680, 687 (7th Cir. 2003) (citations and quotations omitted), *cert. denied*, 542 U.S. 945 (2004); *see also Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan v. Willard*, 393 F.3d 1119, 1125 (10th Cir. 2004) ("[w]e find that the instant case, rather than involving one for monetary damages, involves exactly the type of equitable restitution claim the Court had in mind in *Great-West*"); *Bombardier Aerospace Employee Welfare Benefit Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348, 355 (5th Cir. 2003) ("[B]ecause it seeks to recover specifically identifiable funds that are in the constructive possession and the legal control of the participant but belong in good conscience to the Plan, its action for a constructive trust in no way seeks to impose personal liability on either defendant."), *cert. denied*, 541 U.S. 1072 (2004). MAMSI's subrogation-based restitution claim seeking the return of monies paid on the Sereboffs' behalf therefore falls well within the ambit of Section 502(a)(3).

The position advocated by Petitioners and their supporting *amicus* the American Trial Lawyers Association ("ATLA"), which is premised on Sixth and Ninth Circuit rulings rejecting subrogation-based restitution as a legitimate form of equitable relief, completely mischaracterizes *Knudson*. *See* Pet. Br. 12-23; Brief *Amicus Curiae* of ATLA 4-15 ("ATLA Br."). In Petitioners' view, equitable relief is uniformly unavailable to plan providers both because of the existence of a contract and because the relief sought takes monetary form. *See Westaff (USA) Inc. v. Arce*, 298 F.3d 1164, 1166 (9th Cir. 2002) (denying recovery under Section 502(a)(3) because the plan sought "to enforce a contractual obligation for the payment of money, a classic action at law and not an equitable claim"); *Qualchoice, Inc. v. Rowland*, 367 F.3d 638, 649 (6th Cir. 2004) ("We conclude . . . that the source of the claim asserted by Qualchoice is a contract to pay money and that the procedural mechanisms of constructive trust and equitable lien are not proper mechanisms for enforcing this right[.]"), *cert. denied*, 125 S. Ct. 1639 (2005). Under Petitioners' approach, *Knudson* supports the wholesale elimination of equitable restitution in the ERISA context based solely on the existence of the plan participant's parallel contractual obligation to reimburse the plan.

Contrary to Petitioners' contentions, *Knudson* expressly contemplates concrete situations where plan fiduciaries can obtain equitable monetary reimbursement. *See Knudson*, 534 U.S. at 213 ("[A] plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where *money* or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular *funds* or property in the defendant's possession.") (emphasis added). Thus, as one court correctly has observed, "the approach of the Sixth and Ninth Circuits simply proclaims that because the plan fiduciary's rights ultimately derive from a contract and the plan seeks money, the plan must be seeking legal relief, a conclusion that is neither necessarily consistent

with historical practice nor sufficiently nuanced under the *Great-West* formulation." *Scholastic Corp. v. Najah Kassem & Casper & De Toledo LLC*, 389 F. Supp. 2d 402, 411 (D. Conn. 2005); *see also Willard*, 393 F.3d at 1125 ("After all, any equitable relief, including those forms explicated by the Court as available under § 502(a)(3), must involve the direct or indirect transfer of money, and we cannot read the statute to proscribe all forms of relief."); *Wellmark, Inc. v. Deguara*, 257 F. Supp. 2d 1209, 1215 -1216 (S.D. Iowa 2003) ("The Ninth Circuit follows the ultimate reasoning of *Great-West* without noting the essential factual distinction Justice Scalia specifically discussed when the "money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession.") (internal citations omitted).

Furthermore, the means that MAMSI employed to vindicate its equitable interest comport fully with traditional equity jurisprudence. MAMSI sought to impose a constructive trust or, in the alternative, an equitable lien. There can be no dispute that both of these remedies are proper equitable vehicles for recovering funds from the Sereboffs. *See Knudson*, 534 U.S. at 213. There also can be no legitimate dispute that the settlement funds belong "in good conscience" to MAMSI. *See Willard*, 393 F.3d at 1122 (explaining that because the plan "contained [an] express, unambiguous reimbursement provision[] . . . the disputed funds belonged in good conscience to the plan") (internal citations omitted). Last, the settlement funds are identifiable and traceable to money in the Sereboffs' possession. Thus, as the Fourth Circuit properly concluded, MAMSI is entitled to equitable restitution through the imposition of a constructive trust or equitable lien because it seeks "to recover funds that are specifically identifiable, belong in good conscience to

MAMSI, and are within the possession and control of the Sereboffs." *Mid Atl. Med. Servs., LLC v. Sereboff*, 407 F.3d 212, 218 (4th Cir. 2005), *cert. granted*, 126 S. Ct. 735 (2005).[2]

Knudson makes clear that plan recovery in the circumstances presented here is precluded only in a narrow band of cases where the funds have been dissipated so that no product remains. Only in such a case are the funds untraceable to an identifiable fund. By contrast, there is no dispute in this case that the Sereboffs had an equitable duty to reimburse MAMSI and failed to do so. Moreover, the funds at issue – the settlement proceeds – remain in the possession and control of the Sereboffs. The Fourth Circuit thus correctly ruled that MAMSI is entitled to a constructive trust or equitable lien pursuant to Section 502(a)(3).[3]

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2 . The Court should make clear that Section 502(a)(3) permits recovery regardless of whether the plan has paid money directly to the participant or paid the fees of a third-party medical provider. In either case, despite Petitioners' argument to the contrary, *see* Pet. Br. 20-21, the identifiable "res" is the damages award or settlement proceeds – not the money transferred from the plan to the participant. Petitioners' argument that only the money "literally" paid to the participant could be subject to equitable recovery, *see* Pet. Br. 20, elevates abstraction over substance and would effectively preclude equitable subrogation in all cases, a proposition rejected by this Court in *Mertens*, *Harris Trust*, and *Knudson*.

3. Requiring the Sereboffs to reimburse the plan not only comports with principles of equity but with basic economic logic as well:

> [F]rom the standpoint of optimal risk allocation, the fortuitous presence of an injurer who is liable for the insured's losses does not affect the risk that the insured should optimally bear. Thus, if it is optimal for the insured to bear the risk of uncovered losses associated

(Cont'd)

II. SECTION 502(a)(3) DOES NOT ALLOW PLAN PARTICIPANTS TO FRUSTRATE RECOVERY BY CONVERTING, MINGLING, OR SHIFTING FUNDS SUBJECT TO EQUITABLE RESTITUTION.

As the Fourth Circuit properly held, *Knudson* does not eviscerate the rights of plan providers to seek reimbursement from plan participants. Embracing a crabbed reading of *Knudson*, however, plan participants and trial lawyers have devised creative stratagems to avoid their equitable restitution obligations. Specifically, plan participants and their counsel have parsed *Knudson* to draw a roadmap for avoiding reimbursement obligations that relies upon a tortured and narrow view of the "identifiable fund" and "traceability" requirements. In their view, equitable restitution is available only if the settlement proceeds remain in the plan participant's actual possession and in a pristine and segregated fund. For the reasons set forth below, neither traditional equity jurisprudence nor this Court's decisions interpreting Section 502(a)(3) condone these attempts to avoid lawful claims of equitable restitution through cynical machinations calculated to frustrate a plan provider's right of recovery.

The inexorable thrust of the arguments advanced by the Sereboffs and ATLA is that *Knudson* allows plan participants and plaintiffs' lawyers to avoid equitable restitution obligations by converting the funds before a constructive trust or equitable lien is established. *See* Pet. Br. 20-21; ATLA Br. 9-10. This position is specious. In *Knudson*, this Court confronted an anomalous set of circumstances in which the plan participant *never obtained or controlled* the settlement

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> with accidents in which no injurer is liable, the insured should bear the same risk in accidents in which an injurer is liable.

Alan O. Sykes, *Subrogation and Insolvency*, 386.

proceeds secured in the personal injury suit. California law required that the settlement proceeds be placed directly in a "Special Needs Trust" to provide for Janette Knudson's medical care. *See Knudson*, 534 U.S. at 207. Relying on this unusual circumstance, the Court explained that recovery was unavailable because the funds had been "dissipated so that no product remain[ed]" and, for this reason, Great-West could only present a legal restitution claim akin to that of a general creditor. *Id.* at 213.

"Dissipation" of fund assets so that "no product remains" – as traditional equity law understands these terms – is an exceptionally rare occurrence. For example, as the comment to Section 215 of the Restatement explains, dissipation occurs "if the wrongdoer has used the money of the claimant in speculation and has lost it all" or "if a trustee sells trust property and dissipates the proceeds." RESTATEMENT (FIRST) OF RESTITUTION § 215 cmt. a. In these narrow circumstances, "the claimant cannot enforce a constructive trust of or an equitable lien upon other property of the wrongdoer, and has only a personal claim against the wrongdoer, and is not entitled to priority over other creditors of the wrongdoer." *Id.* As a necessary corollary to this principle, however, there *is* a general right of equitable recovery whenever a "product" remains. Thus, in at least three common circumstances, *Knudson* does not preclude recovery because a "product" remains that can be traced to an identifiable fund.

First, a plan participant cannot avoid equitable restitution by converting the damages award or settlement proceeds to his or her own use. As the Restatement explains, "[w]here a person . . . disposes of property of another . . . and acquires in exchange other property, the other is entitled *at his option* to enforce either (a) a constructive trust of the property so acquired, or (b) an equitable lien upon it to secure his claim for reimbursement from the wrongdoer." RESTATEMENT (FIRST)

OF RESTITUTION § 202.[4] Importantly, this equitable rule applies even where "there is no fiduciary relationship between the wrongdoer and the claimant." *Id.* cmt. b. Accordingly, the participant cannot preclude equitable recovery by using monies that otherwise would be subject to equitable restitution to purchase property.

The Supreme Court consistently has endorsed this view of equity law. In *Harris Trust*, 530 U.S. at 250, this Court made clear that the "trustee or beneficiaries may . . . maintain an action for restitution of the property (if not already disposed of), and *disgorgement of proceeds (if already disposed of)*, and disgorgement of the third person's profits derived therefrom." (emphasis added). And the Court was careful to explain that its decision in *Knudson* in no way undercut the rule of *Harris Trust*. *See Knudson*, 534 U.S. at 215 ("While we did not expressly distinguish between legal and equitable restitution, the nature of the relief we described in *Harris Trust* – a claim to specific property (*or its proceeds*) held by the defendant – *accords with the restitution we describe as equitable today*.") (emphasis added). *Harris Trust* and *Knudson* therefore unequivocally confirm that the conversion of funds subject to equitable restitution does not insulate a plan participant from liability.[5]

4. This rule also requires the wrongdoer to surrender any proceeds from the transfer. *See id.* § 202 cmt c ("The rule which compels the wrongdoer to bear any losses and to surrender any profits operates as a deterrent upon the wrongful disposition of the property of others."). "Accordingly, the person whose property is wrongfully used in acquiring other property can by a proceeding in equity reach the other property and compel the wrongdoer to convey it to him. The wrongdoer holds the property so acquired upon a constructive trust for the claimant." *Id.*

5. ATLA argues that a plan should not be permitted to exercise its right to reimbursement unless the plan participant has been "made whole" by the damages award or settlement, even where the plan

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Second, despite some confusion in the lower courts, plan participants cannot avoid equitable restitution by mingling the damages award or settlement proceeds with their personal assets. "Where a person wrongfully mingles money of another with money of his own, the other is entitled to obtain reimbursement out of the fund." RESTATEMENT (FIRST) OF RESTITUTION § 209. As the comment further explains, "[t]he person whose money is wrongfully mingled with money of the wrongdoer does not thereby lose his interest in the money, although the identity of his money can no longer be shown, but he acquires an interest in the mingled fund." *Id.* cmt. a.[6] This rule extends to property acquired through

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expressly provides otherwise. *See* ATLA Br. 27-29. The Court should reject ATLA's argument for its preferred version of the "made whole" rule. Federal common law stands in direct opposition to such a rule. *See, e.g., Copeland Oaks v. Haupt*, 209 F.3d 811, 813 (6th Cir. 2000) (explaining that a plan can override the "made whole" rule by being "specific and clear in establishing *both* a priority to the funds recovered *and* a right to any full or partial recovery"). To the extent that ATLA is asking this Court to permit state rules of decision to govern, ATLA's argument would produce an untenable regime, because the states do not apply the "made whole" rule in a uniform manner. For example, Ohio has adopted the federal rule, *see N. Buckeye Educ. Council Group Health Benefits Plan v. Lawson*, 798 N.E.2d 667, 673 (Ohio Ct. App.), *aff'd* 814 N.E.2d 1210 (Ohio 2004), Indiana has adopted a percentage-based approach, *see* Ind. Code § 19 34-51-2-19, and several states apply the rule absolutely, *see, e.g., York v. Sevier County Ambulance Authority*, 8 S.W.3d 616, 617 (Tenn. 1999). To adopt ATLA's position thus would undermine a basic precept of ERISA that plans should not be subject to fifty different state laws. *See, e.g., Larocca v. Borden, Inc.*, 276 F.3d 22, 30 (1st Cir. 2002) ("ERISA preempts state legislation designed to limit plans' subrogation and coordination of benefits provisions.") (citing *FMC Corp. v. Holliday*, 498 U.S. 52 (1990)).

6. And, "if the wrongdoer is insolvent, the other person is entitled to restitution out of the mingled fund and is entitled to priority over other creditors of the wrongdoer." RESTATEMENT OF RESTITUTION § 209.

the use of the mingled funds. *See id.* § 210 ("Where a person wrongfully mingles money of another with money of his own and with the mingled fund acquires property, the other is entitled to an equitable lien upon the property to secure his claim for reimbursement."); *see also Skretvedt*, 372 F.3d at 214 (explaining that because "we need look no further than the ERISA plans that withheld Skretvedt's benefits[,] . . . [a]s did the fiduciaries in *Harris Trust*, Skretvedt has sufficiently identified specific funds traceable to the defendant ERISA plans that belong in good conscience to him"); *In re Anjopa Paper & Bd. Mfg. Co.*, 269 F. Supp. 241, 261 (S.D.N.Y. 1967) ("It is a principle well established that the mere fact that a claimant's money is mingled with money of the wrongdoer does not preclude the claimant from tracing his money into the mingled fund and enforcing an equitable lien upon it.").[7]

Some courts have adhered to the Restatement's articulation of this rule when construing Section 502(a)(3). *See, e.g., Bohannan v. Wal-Mart Benefits Dept. Enrollment Team*, No. 504CV150FJSGJD, 2005 WL 1460336, at *5 (N.D.N.Y. June 20, 2005) (unpublished decision) ("It is not necessary that the precise items of currency be identifiable, which, in electronic transactions, would never be possible.") *Lumenite Control Tech., Inc. v. Jarvis*, 252 F. Supp. 2d 700, 704 (N.D. Ill. 2003) ("Where a single account contains money to which the account holder is entitled as well as money that rightfully belongs to another person, the rightful owner is entitled to a lien on the commingled fund . . . . in the amount of his own monies traceable to it. . . . D. Dobbs, LAW OF REMEDIES 6.1(4) (2d ed. 1993).").

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7. Equity deals even more harshly with those who intentionally use the mingled funds to purchase property in order to thwart the claim of restitution. *See id.* § 210 ("If the wrongdoer knew that he was acting wrongfully, the other is entitled at his option to a share of the property in such proportion as his money bore to the whole amount of the fund.").

Other courts have effectively ignored the approach endorsed in the Restatement and deemed commingling a bar to recovery. *See, e.g.*, *BlueCross BlueShield v. Carillo*, 372 F. Supp. 2d 628, 638 (N.D. Ga. 2005) ("Plaintiff does not seek recovery of specified, identifiable funds, but instead seeks recovery of funds that have been comingled into various checking accounts and spent, in part, to purchase a truck. Under those circumstances, relief under § 1132(a)(3) is unavailable."); *Popowski v. Parrott*, 403 F. Supp. 2d 1215, 1220 (N.D. Ga. 2004) ("The only information before the court is that Defendant received slightly more than $200,000 in net settlement proceeds in October 2003. Those funds were placed in her joint checking and/or savings account with her husband. . . . Thus, . . . the funds have never been segregated into an identifiable amount or location."); *Aetna Life Ins. Co. v. DFW Sleep Diagnostics Center*, No. Civ.A.02-1335, 2004 WL 1922033, at *5 (E.D. La. Aug. 25, 2004) (unpublished decision) ("Specifically identifiable funds are those that can clearly be traced to particular funds or property . . . [because] . . . the allegedly excess funds Plaintiff paid to Defendants have either been dissipated or commingled with other funds received from various other payors or sources.").

Despite the chicanery erroneously promoted by decisions like *Carillo*, *Popowski*, and *DFW Sleep Diagnostics Center*, there can be no doubt that funds remain "identifiable" and "traceable" even if they are mingled with the participant's general assets. To hold otherwise would render Section 502(a)(3) an empty promise by grafting a temporal element onto Section 502(a)(3) that finds no support in ERISA. *See, e.g.*, *Primax Recoveries Inc. v. Carey*, 247 F. Supp. 2d 337, 342 n.5 (S.D.N.Y. 2002) (denying restitution "when the 'settlement proceeds' are in nobody's possession, because they are the entirely hypothetical fruit of a potential future settlement that does not yet exist and may never come into

being at all").[8] A plan fiduciary's right of recovery should not depend on its ability to spring into action at precisely the same moment that the plan participant secures a damages award or settlement from the tortfeasor.[9] Putting aside that the adoption of such a rule would reward plan participants for dissembling to avoid their reimbursement obligations, Section 502(a)(3) cannot be read to compel such an absurd result.

Third, plan participants cannot avoid equitable restitution by placing the damages award or settlement proceeds in the possession of their attorneys. Trial lawyers have taken the remarkable position that equitable restitution is unavailable whenever the funds have been placed under their control. *See, e.g.*, *Mank v. Green*, 368 F. Supp. 2d 102, 109 (D. Me. 2005) (plan participant argued that "29 U.S.C. § 1132(a)(3)

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8. *But see Primax Recoveries Inc. v. Duffy*, 204 F. Supp. 2d 1111, 1113 (N.D. Ill. 2002) ("As I read the Supreme Court's opinion [in *Knudson*], it does bar plaintiff's action insofar as it seeks to require defendants to repay money already received in the settlement.")

9. As one court has explained:

> [A]t best, there will be a narrow window in which a fiduciary will be able to seek authorized relief. A fiduciary will not be able to seek relief before a beneficiary has gotten relief in his case against the tortfeasor. On the other hand, if a fiduciary waits too long after a beneficiary has gotten relief in his suit against the tortfeasor, the money could be dispersed such that it would no longer be traceable, and therefore would not be "money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."

Admin. Comm. v. Merritt, No. 5:01CV00026, 2003 WL 23213577, at *4 (M.D. Ga. 2003) (unpublished decision) (quoting *Knudson*, 534 U.S. at 213).

permits suits against participants' attorneys only if the attorney has a professional or contractual relationship with the plan and asserting that no such relationship exists in this case"). Neither Section 502(a)(3) – nor any decision of this Court – requires the funds to be in the "actual" possession of the plan participant to permit recovery. Because *Harris Trust* makes clear that a fiduciary relationship is not a prerequisite to recovery under Section 502(a)(3), the plan fiduciary can recover from any party that obtains traceable funds subject to a constructive trust or equitable lien. *See Harris Trust*, 530 U.S. at 239 ("Indeed, § 502(a)(3) makes no mention at all of which parties may be proper defendants – the focus, instead, is on redressing the *act or practice* which violates any provision of ERISA Title I.") (citations and quotations omitted); *see also Bombardier*, 354 F.3d at 353-54 ("As *Harris Trust* makes clear, an entity need not be acting under a duty imposed by one of ERISA's substantive provisions to be subject to liability under § 502(a)(3).").

If the plan can recover from third parties under *Harris Trust*, the plan certainly can place a constructive trust or equitable lien on funds in the possession of the participant's authorized agent. *Id.* at 356 (explaining that "funds that the Plan is seeking to recover belong to the participant and are simply being held in a bank account in the name of the participant's attorneys, who are indisputably his agent. Unlike the beneficiaries in *Knudson* . . . the Plan's participant . . . has ultimate control over, and thus *constructive* possession"). (emphasis in original); *see also IBEW-NECA Sw. Health and Benefit Fund v. Douthitt*, 211 F. Supp. 2d 812, 816 (N.D. Tex. 2002) ("In *Great-West Life*, the settlement proceeds were placed in a Special Needs Trust account . . . [and thus] . . . the disputed funds were outside of the defendant's possession and control. In this case, however, the settlement proceeds are being held by Defendant's attorney, as he must do under Texas law."), *aff'd* 98 Fed. Appx. 306 (5th Cir. 2004);

Great-West Life & Annuity Ins. Co. v. Smith, 180 F. Supp. 2d 1311, 1313 (M.D. Fla. 2002) ("While the law firm is correct that it cannot be considered an ERISA fiduciary, a cause of action pursuant to § 1132(a)(3) can be stated against a non-fiduciary.") (internal citation omitted). As at least one court has pointedly observed, "[t]he emphasis on the sanctity of plan provisions does not allow lawyers to be the enablers for participants to avoid following an ERISA plan's provisions without being called to account for such actions under ERISA's remedial scheme." *Greenwood Mills, Inc. v. Burris*, 130 F. Supp. 2d 949, 960 (M.D. Tenn. 2001).[10]

Notwithstanding the unambiguous equitable grounds for allowing recovery where the damages award or settlement proceeds are shifted to the attorney's account, some courts have permitted the manipulation of Section 502(a)(3) in these circumstances to preclude restitution. *See, e.g., Hotel*

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10. In this regard, contrary to ATLA's arguments, *see* ATLA Br. 29-30, unless the plan terms provide otherwise, a contingency fee claim cannot take priority over the plan participant's preexisting reimbursement obligation. As with the "made whole" rule, *supra* note 5, this regime would subject plans to patchwork state legislative regimes contrary to ERISA's stated goal of uniformity. Also, as the Fifth Circuit explained in *Bombardier*, 354 F.3d at 357:

> This assertion ignores the [participant's] pre-existing contractual reimbursement obligation to the Plan, which requires him to reimburse the Plan the full amount of the benefits that he had received from the Plan and to do so out of any third-party recovery, *without deduction for attorney's fees and costs*. This pre-existing reimbursement obligation to the Plan precluded [the participant] from contracting away to the law firm that which he did not own himself, namely, the right to all or any portion of the [settlement] that rightfully belonged to the Plan. In essence, [the participant] could not create a greater right in the funds by virtue of entering the contingent fee arrangement with the law firm than [he] had himself.

Employees & Rest. Employees Int'l Union Welfare Fund v. Gentner, 50 F.3d 719 (9th Cir.1995); *Chapman v. Klemick,* 3 F.3d 1508, 1510-11 (11th Cir. 1993); *Mid Atl. Med. Servs., Inc. v. Do,* 294 F. Supp. 2d 695 (D. Md. 2003); *Great-West Life & Annuity Ins. Co. v. Bullock,* 202 F. Supp. 2d 461, 465 (E.D.N.C. 2002); *Maryland Elec. Indus. Health Fund v. Levitt,* 155 F. Supp. 2d 482, 484 (D. Md. 2001). These decisions plainly misread *Harris Trust* and *Knudson,* which do not permit the plan participant to shift the damages award or settlement funds to their lawyer's bank account in order to preclude recovery under Section 502(a)(3).

In sum, post-*Knudson,* plan participants and their counsel have cynically resorted to creative schemes calculated to thwart the imposition of a constructive trust or equitable lien. These stratagems include converting the damages awards and settlement proceeds into property, mingling tort recoveries with general assets, and shifting the recoveries into counsel's possession. This Court's decisions construing Section 502(a)(3) cannot and should not be read to condone subterfuges that shield plan participants from lawful equitable restitution claims.

III. A MISINTERPRETATION OF SECTION 502(a)(3) WOULD UNIQUELY INJURE SELF-FUNDED PLANS AND ULTIMATELY INURE TO THE DETRIMENT OF PLAN PARTICIPANTS.

It is important to recognize the distinct impact that reversal of the decision below would have on self-funded plans. ERISA grants employers the flexibility to shift the risk associated with employee health benefits to insurance firms or self-fund that risk. By self-funding the risk, employers choose to finance certain risks from their own current revenues, including the medical expenses of their

employees.[11] In contrast to conventional insurance, where the risk of loss is transferred to an insurance carrier upon payment of a premium, self-insurance generally connotes self-assumption (or retention) of one's own risk of a particular loss. As an integral part of a company's risk management program, self-insurance can include the assumption of all or part of a company's risk of loss for health benefits, property and casualty exposures and workers' compensation liabilities. Thus, employers seeking a cost-effective alternative to conventional insurance increasingly have adopted self-insurance programs to manage various elements of risk related to the conduct of their business enterprise.

Companies choose to self-fund employee health benefit plans because, *inter alia*, such plans offer a viable and cost-efficient method of voluntarily providing benefit coverage in the face of rapidly escalating health care costs, and they afford employers greater freedom to offer benefits tailored to their particular needs. *See, e.g., Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003) ("[N]othing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan.") (quoting *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996)), *cert. denied*, 543 U.S. 815 (2004). Consistent with ERISA, "employers have large leeway to design disability and other welfare plans as they see fit." *Id.*; *see also Harris v. Harvard Pilgrim Health Care, Inc.*, 208 F.3d 274, 277 (1st Cir. 2000) ("Since one of the primary functions of ERISA is to ensure the integrity of written, bargained-for benefit plans, generally speaking ERISA does not mandate that a covered plan include

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11. When such benefits are not insured, directly or indirectly, no insurance company is responsible for providing them. Indeed, even before ERISA was enacted, courts understood that an employer that self-funds health benefits is not in the "insurance business." *Farmer v. Monsanto Co.*, 517 S.W.2d 129 (Mo. 1974).

particular substantive provisions.") (internal citations and quotations omitted).

In particular, the ability of employers to exercise direct control over claim settlements, to take advantage of greater flexibility in the design and administration of health plans to meet specific employee needs, to manage cash flows, and to avoid state insurance regulation has stimulated the use of self-insurance mechanisms to fund employee health benefits programs and contributed significantly to their growth.[12] Right to reimbursement clauses are a feature commonly found in employer-sponsored self-funded plans and an integral part of the self-insurance regime. *See Kress v. Food Employers Labor Relations Ass'n*, 391 F.3d 563, 569 (4th Cir. 2004) ("Subrogation clauses requiring reimbursement are, in fact, quite common.") (citation omitted).

While the growth in self-funded plans has been spurred by current market conditions, that growth would not have been possible without the ERISA provisions that buttress the statute's twin goals of promoting solvency and flexibility in employer-provided health benefit plans. ERISA's commitment to solvency is clear. *See, e.g.*, 29 U.S.C. § 1001(b) (explaining that ERISA was enacted to "protect . . . the interests of participants in employee benefit plans and their beneficiaries" and therefore "provid[es] for appropriate remedies, sanctions, and ready access to the Federal courts"); *McGann v. H & H Music Co.*, 742 F. Supp. 392, 393 (S.D. Tex. 1990) (ERISA was enacted to "protect the solvency of employee benefit plans to ensure that the valid claims of employees and their beneficiaries will be paid.") (citation omitted).

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12. For example, companies that pay for health benefits from assets gain the financial advantage of the time-value of their capital. Because medical claims are paid as submitted, company assets can be retained as working capital and invested. Thus, interest can be earned on funds that are retained by the employer and that otherwise would be paid in the form of premiums for conventional insurance.

ERISA's commitment to flexibility is equally well settled. *See, e.g., Metro. Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 732 (1985) (ERISA "does not regulate the substantive content of welfare-benefit plans."); *Hickey v. A.E. Staley Mfg.*, 995 F.2d 1385, 1393 (7th Cir. 1993) (Congress "never intended ERISA to dictate the *content* of welfare benefit plans, much less for the federal courts to determine the *content* of such plans.") (emphasis in original); *Land v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Health & Welfare Fund* 25 F.3d 509, 514 (7th Cir. 1994) ("ERISA's purpose is not to govern the content of welfare-benefit plans but to require the disclosure and reporting of financial and other information, to establish standards of conduct, and to provide appropriate remedies and ready access to the federal courts.") (citing 29 U.S.C. § 1001(a)(b)).

Because ERISA is committed to guaranteeing solvency without regulating the substantive content of plans, "[a] primary purpose of ERISA is to ensure the integrity and primacy of the written plans." *Health Cost Controls v. Isbell,* 139 F.3d 1070, 1072 (6th Cir. 1997) (citing *Duggan v. Hobbs,* 99 F.3d 307, 309-10 (9th Cir.1996; *Van Orman v. Am. Ins. Co.*, 680 F.2d 301, 312 (3d Cir.1982)). The right to equitable reimbursement under Section 502(a)(3) is central to this fundamental purpose. By allowing plans to recover paid medical expenses that are the financial responsibility of third parties, eliminating duplicative payments and preserving limited benefit dollars for the benefit of all participants, right to reimbursement provisions enable employers to offer enhanced benefits to covered participants.[13] By contrast, the effective nullification of reimbursement, which is precisely what the Sereboffs and ATLA would have this Court do,

13. Right to reimbursement clauses generally are triggered in response to legal action or settlements in civil cases for automobile accidents, product defects, accidents on private or public property or for malpractice by hospitals or doctors.

would damage self-funded benefit providers and generally undermine ERISA's goal of making health benefits affordable for the Nation's workforce.[14]

If the Court were to reverse the decision of the Fourth Circuit, the inevitable result would be a reduction in the funds available for payment of benefits that, in turn, would produce predictable responses by employers. *First*, it could force many employers to reduce or eliminate certain benefits, increase premiums, or do both, because a plan's ability to obtain reimbursement from participants is a significant factor in establishing benefit levels and plan rates. In the absence of a predictable right to recovery, plans will be forced to protect against the resulting risk by raising rates or decreasing benefits for all participants. Plan participants that honor their obligations under plan reimbursement provisions should not be forced to bear these costs.[15]

Second, to counter an erosion of their reimbursement rights, plan providers may be forced to adopt alternate approaches that shift greater burdens to plan participants. Thus, one option for plan providers faced with escalating costs would be to defer or delay payment of claims for medical expenses related to third-party negligence until the accident liability issues have been fully resolved or until third-party litigation has concluded. *See, e.g.*, *Kress*, 391 F.3d at 568 ("Since third-party accident and sickness benefits are not even covered by the Fund, nor required by ERISA, it makes little sense to argue that ERISA precludes imposing conditions on the receipt of benefits that are in effect an interest-free loan."); *McIntyre v. Carpenters Health and Sec.*

14. Application of the "made whole" and "common fund" rules advocated by ATLA would exacerbate this problem by further reducing recoveries and engendering litigation at both the state and federal level.

15. Of course, the game of cat and mouse that plan providers are required to play with participants and trial lawyers in the current legal environment carries costs unto itself.

Trust, __ F. Supp. 2d __, No. CO5-5724FDB, 2006 WL 118249, at *9 (W.D. Wash. Jan. 13, 2006) ("Nothing required Jamie McIntyre to accept the reimbursement option; she was free to reject the advancement of benefits. But where she did accept the advanced benefits offer, and then recovered against the third party, it was not wrongful for the Trust to seek to recoup the advanced benefits and to cease making further advancements.").

Third, to secure the certainty of recovery that judicial misinterpretation of Section 502(a)(3) would deny, plans could choose to offset future benefits. In other words, a plan could add language to an existing subrogation provision permitting the fiduciary to deny future benefits equal to the amount of money that should have been reimbursed under the terms of the plan. *See, e.g., McIntyre*, __ F. Supp. 2d __, 2006 WL 118249, *9 (explaining that "the Trust is authorized to cease advancement of benefits if there is a reasonable basis to believe that the parties involved will not honor the terms of the reimbursement provisions"). Or, more drastically, plan sponsors might be compelled to amend their plans to exclude coverage for medical expenses related to negligent third-party claims. *See, e.g., Ryan by Capria-Ryan v. Federal Express Corp.*, 78 F.3d 123, 127 (3d Cir. 1996) ("ERISA neither requires a welfare plan to contain a subrogation clause nor does it bar such clauses or otherwise regulate their content.") (citing *Land v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Health and Welfare Fund*, 25 F.3d 509, 514 (7th Cir. 1994)).

The net consequences of all of these possible outcomes would be higher plan costs that will be shifted to all plan participants, including plan participants that honor the terms of their agreements. This unnecessary and unwarranted shift of risk allocation would come at time when employers are finding it increasingly difficult to provide benefits to their employees. *See, e.g.*, Henry J. Kaiser Family Foundation,

The Uninsured: A Primer, Key Facts About Americans Without Health Insurance, Nov. 10, 2004, http://www.edpma.com/files/public/unisuredprimer.pdf (explaining that approximately 38% of all workers are employed by smaller businesses and that less than 2/3 of these small businesses offer health benefits to their employees). As the National Coalition on Health Care has explained, "[r]apidly rising health insurance premiums is the main reason cited by all small [businesses] for not offering coverage. Health insurance premiums are rising at extraordinary rates." National Coalition on Health Care, Facts on Health Insurance Coverage, available at http://www.nchc.org/facts/ coverage.html ("Over the past five years the average annual increase in inflation has been 2.5 percent while health insurance premiums have escalated an average of 11.4 percent annually.") (citing Henry J. Kaiser Family Foundation., Employee Health Benefits: 2004 Annual Survey, September 9, 2004, http://www.kff. org/insurance/7148/index.cfm.[16]

In turn, increased costs inevitably will lead to a reduction in the number of individuals that are able to afford insurance. As one report explained, a one-percent increase in plan costs "results in a potential loss of insurance coverage for about 315,000 individuals" over a five-year span. *See* Health Econs. Practice Group, Barents Group, LLC, *Impacts of Four Legislative Provisions on Managed Care Consumers*: 1999-2003, http://www.nchc.org/facts/facts%20 sheets%20 coverage.pdf. The Court should not endorse a rule that allows some participants to benefit from inequitable practices to the

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16. And, even when employers do offer coverage, employees increasingly cannot "afford their portion of the premium. Employee spending for health insurance coverage (employee's share of family coverage and deductibles) has increased 126 percent between 2000 and 2004." *See* National Coalition on Health Care, Facts on Health Insurance Coverage, http://bcbshealthissues.com/relatives/17280.pdf.

detriment of all plan participants, because it is impossible to reconcile such a rule with the plain language of Section 502(a)(3), this Court's precedents, or the core purposes of ERISA.

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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